APPENDIX

(1) Decisons Sought to be Reviewed

SUPREME COURT OF FLORIDA

EILEEN M. BRAKE

Petitioner

CASE 86,752
3RD DCA 93-1514
94-2615

THIRD DISTRICT COURT OF APPEAL

Respondent

The petitioner in the above cause has filed a Petition for Writ of Mandamus and Other Relief, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

Overton, Kogan, Harding, Wells and Anstead, JJ., concur

(Certification and mailing list omitted)

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

EILEEN M. BRAKE

Appellant

vs.

EVE E. MURPHY and RICHARD MURPHY

Appellees

Opinion filed August 16, 1995

An appeal from the Circuit Court for Dade County, Robert H. Newman, Judge

Robert M. Brake, for appellant

Harold M. Braxton and Richard T. Kozek, Jr., for appellee.

Before NESBITT, GODERICH and GREEN, JJ

PER CURIAM

Affirmed

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

EILEEN M. BRAKE

Appellant

JANUARY TERM, A.D. 1994

vs.

EVE MURPHY, et al

Appellees

CASE NO. 93-1514

Opinion filed March 22, 1994.

An appeal from the Circuit Court for Dade County, Robert H. Newman, Judge.

Robert M. Brake, for appellant.

Harold Braxton and Richard T. Kozek, Jr., for appellees

Before SCHWARTZ, C.J. and HUBBART and COPE JJ.

PER CURIAM

Eileen Brake appeals an order surcharging her pursuant to section 733.609, Florida Statues (1991), for negligence and breach of fiduciary duty as personal representative of the estate of Eileen E. Murphy. We affirm in part and reverse in part.

After approximately eighteen days of evidentiary hearings, the trial court found that Eileen Brake had "acted improperly and in bad faith in the actions she undertook or failed to undertake while serving as . . . personal representative." The trial court found that Ms. Brake had failed to act prudently in selling an office building which was the estate's largest asset. There was sharply conflicting evidence, which the trial court heard at length. As the findings are supported by substantial competent evidence, the judgment is affirmed with one exception.

One of the surcharge components considered by the trial court was the legal expenses incurred by the estate in defending a foreclosure action brought by Ms. Brake to foreclosure four mortgages on the office building. The order states:

> Eileen Brake breached her fiduciary duty as personal representative by filing a foreclosure action against the estate and the beneficiaries, which action on her party required substantial additional legal proceedings and attorney's fees and ultimately resulted in three of her four mortgages being declared an indebtedness of the estate, with additional interest and with the award of attorneys' fees to her husband, Robert Brake, in the

amount of $40,000, which created and additional expense to the estate.

The first three of the above mentioned mortgages were mortgages placed on the office building prior to the demise of Eileen E. Murphy.[1] The fourth mortgage was placed on the office building while Ms. Brake was personal representative.

As the probate proceedings grew protracted, the trial court found it necessary to appoint an administrator ad litem to take charge of the office building. At the time Ms. Brake filed the foreclosure action, she was still personal representative of the estate, but was no longer in control of the office building. In the foreclosure action the administrator ad litem served as the representative of the estate. As Florida Probate Rule 5.120 (a) indicates, "When it is necessary that the estate of a decedent ... be represented in any probate ... proceeding and . . . the personal representative . . . is . . . interested adversely to the estate . . or is enforcing the personal representative's. . .own debt or claim against the estate. . .the Court may appoint an administrator ad litem..." Furthermore, upon the filing of the foreclosure action, Ms. Brake was removed as personal representative.

Under the statute regulating personal representatives, "If the exercise of power concerning the estate is improper or in bad faith, the personal representative is liable to interested persons for damage or loss resulting from a breach of his fiduciary duty to the same extent as a trustee of an express trust." Florida Statutes Section 733.609, 1991. The statute by its terms applies to improper conduct while exercising one's power as personal representative. In this case the trial of the foreclosure action took place when Ms. Brake was acting in her individual capacity, not as personal representative, and the foreclosure action was defended on behalf of the estate by Herbert Stettin as administrator ad litem.

When the foreclosure action was tried,[2] the court found in Ms. Brake's favor on the first three mortgages. The court found the fourth note and mortgage[3] "voidable at the election of beneficiaries and therefore unenforceable because it was made in violation of Section 733.610, F.S.."[4] Thus Ms. Brake was the prevailing party with respect to three of the four mortgages.

Appellee Eve Murphy acknowledges that Ms. Brake was acting in her individual capacity in the foreclosure action, and that the estate's interest were being defended by the administrator ad litem. Appellee argues, however that the surcharge is nonetheless appropriate. She reasons that if Ms. Brake had proceeded diligently to sell the office building, then the foreclosure action never would have been necessary because the mortgages would have been paid off with the proceeds of the sale.

It is true that the trial court found Ms. Brake guilty of neglect and breach of fiduciary duty with respect to the sale of the office building. However, the evidence was uncontroverted that Ms. Brake filed the foreclosure action only because of the fact that the statute of limitations for foreclosure was to expire with respect to one of the mortgages. Appellees do not dispute that Ms. Brake sought a waiver of the statute of limitations from the estate and beneficiaries, so that it would not be necessary to file the foreclosure action. That waiver was refused. Three of the four mortgages were found to be valid and enforceable. Under these circumstances, we do not see how Ms. Brake can be surcharged with respect to the first three mortgages. In view of the fact that the fourth mortgage was invalidated because it was an encumbrance in favor of the personal representative obtained without required court approval, see Florida Statutes Section 733.610 (1991), we conclude that a surcharge would be within the discretion of the trial court to

assess for a reasonable allocation attributable to that one mortgage.

We have carefully considered the other points on appeal and conclude that no other reversible error has been shown.

The order of surcharge is affirmed except with respect to so much of the surcharge as relates to the mortgage foreclosure action. The mortgage foreclosure aspect of the surcharge order is reversed and the cause is remanded for further proceedings consistent herewith.

Affirmed in part, reversed in part, and remanded.

HUBBART and COPE, JJ., concur

SCHWARTZ, Chief Judge (dissenting in part).

Contrary to the majority, I do not believe that the evidence supports the surcharge imposed upon Ms. Brake for her actions in the dispostion of the office building which formed the bulk of the estate. While the results of the negotiations she conducted were unfavorable, there was no indication, as required to support such a claim, that she acted in "bad faith or want of due prudence and diligence" in that respect. First Trust & Sav Bank v. Henderson, 101 Fla 1437, 1436, 136 So 370, 371 (1931). Since a personal representative is not an insurer of the success of her dealing with estate property, Henderson; In re Estate of Wilson, 116 So 2d 440 (Fla. 2d DCA 1959), I would reverse the judgment below in its entirety. See Henderson; In re Estate of Pearce, 507 So 2d 729 Fla. 4th DCA, 1987); In re Estate of Wilson

[1] Two of the mortgages were in favor of Eileen Brake. One of the mortgages was in favor of Eileen E. Murphy, but was assigned to Eileen Brake.

[2] The foreclosure action was tried before a different judge than the judge presiding in the probate proceeding.

[3] The fourth mortgage was in favor of Eileen M. Brake and Robert M. Brake.

[4] Section 733.610, Florida Statutes (1991), provides:

> Any sale or encumbrance to the personal representative or his spouse, agent, or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction that is affected by a conflict of interest on the part of the personal representative, is voidable by any interested person except one who has consented after fair disclosure, unless
>
> (1) The will or a contract entered into by the decedent expressly authorized the transaction; or
>
> (2) The transaction is approved by the court after notice to interested persons

(2) Orders on Rehearing

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
THIRD DISTRICT

EILEEN M BRAKE JULY TERM, A.D. 1995

Appellant

WEDNESDAY, OCTOBER 11, 1995

vs.

EVE E. MURPHY, et al., CASE NO. 94-2615

Appellees

_____/

Upon consideration, appellant's motion for leave to amend motions for rehearing and rehearing en banc is hereby granted. Appellant's amended motion for rehearing, second amended second section of motion for rehearing and motion for certification to the Supreme Court are hereby denied. Appellant's motion for leave to file Rule 1.540 motion is denied without prejudice to raise before the trial court. Appellant's motion to strike response to amended motion for rehearing and amended motion for rehearing en banc, and motion to strike appellees' response to motion for leave to amend motion for rehearing are denied. NESBITT, GODERICH and GREEN, JJ., concur. Appellant's amended motion for rehearing en banc is denied.

(certification and mailing list omitted)

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

EILEEN M BRAKE

Appellant

vs.

EVE E. MURPHY, et al.,

Appellees

_____/

JANUARY TERM, A.D.1994

JUNE 7, 1994

CASE NO. 93-1514

Upon consideration, appellees' motion for rehearing is hereby denied. Appellant's motion for rehearing is denied. Appellant's Motion to Quash Lower Court Order on Report of Administrator Ad Litem' " is denied. Appellant's Motion to Restrain Actions of Lower Court Pending Issuance of Mandate" is denied. Appellant's Eileen M. Brake's Suggestion of Question of Great Public Importance" is denied. Schwartz, C.J., and Hubbart and Cope, JJ., concur.

Appellees' motion for clarification is granted. The surcharge with respect to the mortgage foreclosure action is reversed. The trial court may, in its discretion, impose a surcharge for so much of the foreclosure action as is fairly attributable to the fourth mortgage. Hubbart and Cope, JJ., concur. Schwartz, C.J., dissents.

Appellants's motion for rehearing en banc is denied

(3) Additional places where 14th Amendment questions raised

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

EILEEN M. BRAKE

Appellant

Case No 94-2615

vs

Lower Tribunal
No 89-5327

EVE E. MURPHY, et al,

Appellees

MOTION FOR REHEARING

Appellant respectfully moves this Honorable Court to grant a rehearing of the Order entered on August 16, 1995, on the grounds that this Court has overlooked or misapprehended the following matters of fact and rules of law requiring reversal, to-wit:.

1. **The failure to rule promptly.**

A. ***The overlooked or misapprehended points of law.***

The **4th and 5th District Courts of Appeal** have held that Rule 2.050 (f), Florida Rules of Judicial

Administration require a trial judge in a non-jury trial to rule promptly after trial is ended, and that the rule suggests that 60 days (less than **6.4%** of the time in this case) approaches an outside time limit. After this time, the Courts say, the presumption of correctness that a judge was able to remember the demeanor of witnesses, their testimony, and the dynamics of the trial, is so slight that a new trial should be held.

...Failure of this Court to follow these conflicting precedents from the other districts, or to write an opinion explaining its disagreement, or failing to certify this question as requested in the briefs by Appellant, deprives Appellant of equal protection of the laws, due process, and an open forum for decision of disputes, as guaranteed by the Constitutions of Florida and the United States

2. **The Disqualification issue**

A. ***The overlooked or misapprehended points of law.***

. . .On like facts the 4th District Court of Appeal in **Levine v State**, 1995, 650 So 2d 666, held that disqualification was required. . .

C. Failure of this panel to follow the precedents from this Court and the 4th District, **or** to refer this question to the entire Court for an en banc decision, **or** to write an opinion explaining its disagreement, **or** failing to certify this question as requested in the briefs by Appellant, deprives Appellant of equal protection of the laws, due process, and an open forum for decision of disputes, as guaranteed by the Constitutions of Florida and the United States.

(Balance of the Petition and the Certificate of Mailing is omitted).

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

EILEEN M. BRAKE,
Appellant, Case No 94-2615

vs Lower Tribunal No 89-5327

EVE E. MURPHY, et al,

Appellees

REPLY BRIEF OF APPELLANT

(Portions omitted)

As pointed out in Appellant's main brief, the Fourth and Fifth District Courts of Appeal have held that such confused judgments, when made more than 90 days after trial has ended, require retrial. . .

If the "equal protection" clause means anything, then a new trial should be granted in the Third District as well. If this Court disagrees with the rulings of its sister Courts, Appellant respectfully request this Court to certify this question to the Florida Supreme Court to reconcile the difference between districts.

(Balance of Brief and Certificate of Mailing omitted)

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

EILEEN M. BRAKE,

Petitioner

vs CASE NO: 86,752

DISTRICT COURT OF APPEAL, DCA Nos 93-1514,
THIRD DISTRICT OF FLORIDA 94-2615

Respondent

_____/

PETITION FOR WRIT OF MANDAMUS
AND/OR
PETITION FOR WRIT OF CERTIORARI
AND OTHER RELIEF

(portions omitted)

Failure of Respondent to honor said conflicting decisions on procedural matters deprives both Petitioner and all litigants within the 3d District Court of Appeal's jurisdiction of equal protection of the laws and access to the Courts of this State, as guaranteed by the 14th Amendment to the Constitution of the United States, and Article 1, Sections 2 and 21 of the Florida Constitution, because: 1) litigants are denied decisions while the memory of the Court is fresh, whereas litigants in the other Districts are given said procedural protection, and 2) litigants are denied the right to trial by judges under circumstances which do **not** give a reasonable appearance of bias against Petitioner and in favor

of the opposing party and her attorneys, unlike litigants in other Districts.

Respondent further deprived Petitioner of her said Constitutional rights by failing to express in an opinion its reasons for refusing to adhere to the principles of law established by these other Courts, thus preventing Petitioner from seeking normal conflict review. Failure of this Court to grant Petitioner's requested remedy would constitute a third deprivation of Petitioner's Constitutional rights to equal protection of the laws.

By a judicious use of mandamus (or, in the alternative, common-law certiorari) this Court can 1) fulfill its duty to insure equal protection of the laws; 2) reasonably control its docket; 3) discourage District Courts from hiding conflict by failing to write opinions; and 4) encourage uniformity between Districts which will then know their efforts will be subject to review.

(Certificate of Mailing omitted)